Supreme Court, U.S.
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No. _____

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In The Supreme Court Of The United States

OCTOBER TERM, 1995

JOSEPH BATTLE,

Petitioner,

v.

DUKE UNIVERSITY, H. KEITH H. BRODIE, THOMAS F. KELLER, and RICHARD STAELIN,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the courts below err in holding that no claim of retaliation is cognizable under 42 U.S.C. § 1981 pursuant to this Court's ruling in Patterson v. McLean Credit Union?

2. Did the courts below err in dismissing the Petitioner's claim of a conspiracy in violation of 42 U.S.C. § 1985(3) on the theory that corporate agents cannot conspire with a corporation, where under the better view the intracorporate conspiracy doctrine does not apply to an action brought under 42 U.S.C. § 1985(3), and where the defendants' conduct fell under an exception to the doctrine if it did apply?

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OPINIONS BELOW

A Petition for Rehearing and Suggestion for Rehearing In Banc was denied by the Fourth Circuit Court of Appeals on June 12, 1995 (A-67).[1] The unpublished decision of the United States Court of Appeals for the Fourth Circuit affirming the District Court's decision was handed down on May 15, 1995 (A-1).

The District Court filed an unpublished opinion on August 5, 1991 (A-52) and another opinion on July 28, 1993 (A-11).

JURISDICTION

On August 5, 1991, the District Court for the Middle District of North Carolina granted Duke's motion to dismiss Counts

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[1]Throughout this Petition, the designation "A" refers to the Appendix submitted with this Petition; the designation "J.A." refers to the Joint Appendix filed in the Fourth Circuit Court of Appeals.

II, III, IV, and V (A-52).[2] On July 28, 1993, the trial court issued a final judgment, denying the Petitioner's motion to reconsider the dismissal of Count II of the Complaint, and granting Duke's motion for summary judgment as to Count I. The remainder of Count V was dismissed with leave to refile in state court.

A Notice of Appeal from the final judgment of the District Court was filed on August 24, 1993, and on May 15, 1995 the Fourth Circuit Court of Appeals issued a decision affirming the judgment of the District Court (A-1). A timely Petition for Rehearing and Suggestion for Rehearing In Banc was filed, and an order denying the Petition for Rehearing and Suggestion for Rehearing In Banc was handed down on June 12, 1995.

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[2]With respect to Count V, the court dismissed the claims against the individual defendants but not those against defendant Duke University.

The jurisdiction of this Court to review the decision of the Fourth Circuit Court of Appeals is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1981 (prior to 1991 amendment):

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1985(3):

> If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or

for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

STATEMENT OF THE CASE

A. Nature Of The Case And Proceedings Below

On April 6, 1990, Dr. Joseph Battle ("Battle" herein) filed a charge of discrimination against Duke University et al. (Collectively referred to as "Duke University," or "University" herein) alleging retaliation for having filed previous EEOC charges (J.A. 37). On July 10, 1990, the EEOC issued a Notice of Right to Sue. Thereafter, on October 9, 1990, Battle filed the Complaint in this action, alleging racial discrimination, retaliation, and conspiracy under 42 U.S.C. §§ 2000e et seq. (Count I), 1981 (Count II), and 1985(3) (Count III). Invoking the District Court's supplemental jurisdiction, Battle also alleged state law causes of action of unfair trade practices (Count IV), and breach of contract (Count V) under North Carolina law.

On August 5, 1991, the trial court granted Duke's motion to dismiss Counts II, III, IV, and V. With respect to Count II, the court held that the plaintiff's discrimination claims were not actionable under § 1981 in light of Patterson v. McLean Credit Union, 491 U.S. 164 (1989). With respect to Count III, the court held that Battle had not stated a claim under § 1985(3) because the individual defendants could not conspire with the school. With respect to Count IV, the court dismissed the claim under N.C. Gen. Stat. § 75-1.1, stating that the relationship between Duke and Battle did not affect commerce, and that Battle could not avail himself of the statute because he was a member of a learned profession. With respect to Count V, the court dismissed the breach-of-contract claim only with respect to the individual defendants.

On July 28, 1993, the court denied Battle's motion to reconsider the dismissal of Count II of the Complaint, granted Duke's motion for summary judgment as to Count I and dismissed Court V with leave to refile in state court. On August 24, 1993, Battle filed a Notice of Appeal from the District Court' orders granting the defendants' motion to dismiss portions of the Complaint and granting summary judgment to Duke. The United States Court of Appeals for the Fourth Circuit heard the appeal pursuant to 28 U.S.C. § 1291, and affirmed the judgment of the District Court on May 15, 1995. A Petition for Rehearing and Suggestion for Rehearing In Banc was denied on June 12, 1995.

B. Statement Of Facts

The Petitioner, Joseph Battle, a black male, began employment in 1970 with Duke University as a fully tenured Associ-

ate Professor in Duke's Fuqua School of Business. Battle served in various capacities, including Director of the Master of Business Administration Program at Duke University (J.A. 4-5).

Battle, at least as early as 1980, made complaints of racial discrimination at the hands of his superiors at Duke University. These complaints were submitted to a faculty discrimination committee of Duke University, and that committee found merit in the charges. However, Duke University then dismissed this committee and formed a new committee to exonerate Duke University of any guilt in the matter (J.A. 5, 22).

Thereafter, Battle continued to complain that Duke University was discriminating against him and, as a result thereof, Battle and Duke University agreed to present certain of Battle's claims and complaints to an arbitrator (J.A. 17-24).

In the 1983 arbitration award, the arbitrator, William J. Kennedy III, found that there had indeed been racial discrimination against Battle in numerous instances, and ruled in favor of Battle on his salary claims. The arbitrator also awarded Battle $500,000 for damage to his professional reputation, and $500,000 in the event of any act of retaliation or bad faith by Duke University or its employees or agents as a result of the case (J.A. 17-24).

In an action brought by Duke seeking to modify or vacate the arbitrator's award on the grounds that he exceeded the scope of his authority, the United States District Court for the Middle District of North Carolina confirmed the portion of the award granting Battle additional salary to make up for racial discrimination, but vacated those portions of the award which gave Battle the two $500,000 damages

amounts. Thus, the final determination affirmed, in effect, that portion of the arbitrator's decision finding that Duke was guilty of racial discrimination against Battle and was, as a result, liable to him for damages in the form of increased salary (J.A. 25). It is highly significant that the same administrators of the Fuqua School of Business who were adjudged guilty of discrimination against Battle by Arbitrator Kennedy in 1983 remained in charge of the Fuqua School of Business and have not been disciplined or reprimanded in any way by Duke for such conduct.

Despite Duke's defeat in arbitration, Battle continued to suffer discrimination by Duke University and ultimately filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) in January 1986 (J.A. 26-28). The EEOC dismissed the charge in June 1987, only

after Duke had agreed to offer Battle what the EEOC termed the "full relief" allowable under Title VII (J.A. 29). Battle's attorney at that time, James E. Ferguson II, entered into negotiations with Duke which resulted in the Agreement between Battle and Duke University dated October 21, 1987 (hereinafter "Agreement"), just as the Notice of Right to Sue from the EEOC was expiring (J.A. 7, 30-36, 446-52).

The Agreement provides that Duke University is to pay Battle a sum for back pay, and that Duke University would pay sums to Battle in settlement and compromise of Battle's allegations of pain and suffering arising from racial discrimination. These sums have been and are continuing to be paid to Battle by Duke. In addition, the Agreement provides that Battle is to go on personal leave of absence without employment duties, respon-

sibilities, or obligations of any sort whatsoever. Duke also agreed to "promote Battle to the rank of Professor of the Practice of Business Administration" by action at the Board of Trustees' next meeting (J.A. 8, 32, 448). Battle agreed to officially retire from the Duke faculty three years following execution of the Agreement (i.e., in the fall of 1990). Upon such retirement, Duke agreed to designate Battle as Professor Emeritus of the Practice of Business Administration. As was admitted in the deposition of Duke by its attorney, David Adcock (J.A. 14, lines 11-22), Duke did not, in fact, "promote" Battle to the rank of Professor of the Practice of Business Administration. In fact, Duke never intended to afford Battle a promotion under the normal and customary terms afforded other professors.

The Agreement also provided that Duke would provide Battle office space "gener-

ally comparable to office space Battle currently occupies," and a computer with certain specifications and software. In addition, the parties agreed that all facts relating to the negotiations, terms, contents, and other matters related to the Agreement would remain confidential and would not be disclosed or commented upon in any manner by Battle (J.A. 8-9, 34, 450).

In January of 1988, Battle first wrote to Duke University to point out that Duke had not given him his computer or notified him or announced generally that it had in fact promoted him to the rank of Professor of the Practice of Business Administration (J.A. 8-9, 454). Shortly after this communication, Duke cut off the provision of Battle's secretarial assistance and eliminated the handling of his mail by the Fuqua School of Business (J.A. 8, 453). Battle was eventually provided

with an inoperable, dirty, and shopworn computer which was never replaced (J.A. 8-9, 402-03, 461).

Thereafter, Battle's name began to be omitted from certain directories and publications listing Business School faculty. Battle's office was also moved to Perkins Library in the late summer of 1988, and despite the Agreement to provide "generally comparable" office facilities, Duke failed to provide Battle with the customary secretarial, copying, or mail service he had enjoyed at the Fuqua School of Business facility both before and after the 1987 Agreement was signed (J.A. 9, 405). In addition, Duke University, via Dr. Brodie, breached its duty to keep confidential the terms and conditions of the Agreement and related facts (J.A. 8-9, 409-15).

In his Complaint, and throughout the course of the litigation and the appeal,

Battle asserted that Duke delayed and frustrated performance of the obligations pursuant to the Agreement by Duke University and its employees, including the individual defendants. This delay and frustration of Duke's obligations was carried out in a manner and for the purpose of retaliating against him for his complaints of racial discrimination against Duke University in the past. In addition, a reasonable inference to be drawn from the facts as alleged in the Complaint is that Duke intended, at the time the Agreement was entered into, to refuse to provide Battle with the same rights to, and incidents of, promotion that it normally afforded to white professors and to those who made no complaints of discrimination.

Battle continued to complain of Duke University's failure (through its employees, including the individual defendants)

to perform its obligations under the Agreement and of retaliation against him for making claims of racial discrimination in the past. In April 1990, Battle filed a charge of discrimination against Duke University alleging retaliation for having filed previous EEOC charges. In response to this charge, Delores Burke, Special Assistant to the President, stated in a letter dated April 18, 1990 that Battle was no longer an employee of Duke University (J.A. 39, 474-75). Later, Ms. Burke alleged that Battle had not even been promoted (J.A. 38, 476-77). On July 10, 1990, the EEOC issued a Notice of Right to Sue. The Notice contained the assertion that there was no employer-employee relationship between Duke University and Battle and that, on this basis, the Commission declined to exercise jurisdiction. Thereafter, on October 9, 1990, Battle filed the Complaint in this action.

REASONS FOR GRANTING THE WRIT

I. THE COURTS BELOW ERRED IN HOLDING THAT ANY CLAIMS ALLEGING RETALIATORY CONDUCT WERE NO LONGER ACTIONABLE AFTER PATTERSON V. MCLEAN CREDIT UNION, AND THAT BATTLE HAD NOT STATED A CLAIM OF RETALIATION STILL COGNIZABLE UNDER § 1981 AFTER PATTERSON.

In Patterson v. McLean Credit Union, 491 U.S. 164 (1989), this Court significantly narrowed the types of claims which could be brought under § 1981. In Patterson, the Court explicitly rejected a claim of postformation racial harassment under § 1981. Id. at 184. The Court focused on the language of § 1981, noting that the statute only prohibits impairment of the right to make and enforce contracts. Id. at 165. The former term encompasses only discrimination in the formation of a contract and the latter term encompasses only "the right of access to legal process, that will address and resolve contract-law

claims without regard to race." Id. at 177.[3]

Although Patterson clearly slammed the door shut on postformation racial harassment, it left the door open for other discriminatory and retaliatory conduct which occurs after an employment relationship has been established. In particular, Patterson did not prevent the use of § 1981 to redress retaliatory conduct designed to inhibit complaints of discrimination within the scope of § 1981 by contracting parties. In addition, the Court left open a cause of action for a

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[3]Although the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 ("CRA" or "the Act" herein) amended § 1981 to prohibit discrimination in "the making, performance, modification and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship," 42 U.S.C. § 1981(b), Battle conceded on appeal that § 1981(b) did not apply retroactively pursuant to this Court's decision in Rivers v. Roadway Express, Inc., 114 S. Ct. 1510 (1994).

contracting party's refusal to enter into a contract except on discriminatory terms.

In Lytle v. Household Manufacturing, Inc., 494 U.S. 545, 556 (1990), this Court declined the employer's invitation to affirm the Fourth Circuit's dismissal of a retaliation claim under § 1981 on the basis that such a claim was no longer actionable after Patterson. In her concurrence, in which Justice Scalia joined, Justice O'Connor stated:

> I join the Court's opinion but write separately to note what the Court acknowledges in the last sentence of a footnote, see ante, at 1336, n. 3: that the question whether petitioner has stated a valid claim under § 1981 remains open.

Id. at 556.

The Court remanded the case to the Fourth Circuit to address this issue, which was, and still is, an open issue not yet addressed by this Court.

Although this Court has not yet resolved the issue, it appears that a major-

ity of courts have concluded that retaliation claims, at least those based solely on retaliatory conduct in the terms and conditions of employment or retaliation resulting in discharge, are not actionable under Patterson. See, e.g., Williams v. First Union National Bank of North Carolina, 920 F.2d 232 (4th Cir. 1990), cert. denied, 500 U.S. 953 (1991); Carter v. South Central Bell, 912 F.2d 832 (5th Cir. 1990), cert. denied, 111 S. Ct. 2916 (1991);[4] Von Zuckerstein v. Argonne National Laboratory, 984 F.2d 1467 (7th Cir. 1993); Williams v. KETV Television, Inc., 26 F.3d 1439 (8th Cir. 1994); Goldsmith v.

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[4]Although one panel of the Fifth Circuit Court of Appeals has interpreted Patterson to foreclose a claim under § 1981 for retaliation in response to a suit under Title VII, Carter v. South Central Bell, supra, another panel upheld a jury verdict on a public employee's claim of retaliation, apparently both racially and politically motivated, under § 1981 and 42 U.S.C. § 1983. Steverson v. Goldstein, 24 F.3d 666 (5th Cir. 1994).

City of Atmore, 996 F.2d 1155 (11th Cir. 1993).

The Seventh Circuit Court of Appeals has struggled with the continued viability of retaliation claims after Patterson, indicating in several decisions that claims of retaliation were not necessarily precluded. See Daniels v. Pipefitters' Association Local Union No. 597, 945 F.2d 906 (7th Cir. 1991); Mozee v. American Commercial Marine Service Co., 940 F.2d 1036, 1051-52 (7th Cir. 1991); Bailey v. Northern Indiana Public Service Co., 910 F.2d 406, 411 (7th Cir. 1990); McKnight v. General Motors Corp., 908 F.2d 104, 111-12 (7th Cir. 1990); Malhotra v. Cotter & Co., 885 F.2d 1305, 1313 (7th Cir. 1989). In Malhotra, the court suggested that retaliation might be actionable, where the retaliation was racially motivated and interfered with a plaintiff's ability to

make or enforce contracts on the same footing as white persons.

In McKnight, the court held that where the employer retaliates or threatens to retaliate in order to interfere with an employee's attempt to enforce a right established in a contract, the employer's action falls within the scope of § 1981, so long as the retaliation had a racial motivation. 908 F.2d at 111-12 ("If, therefore, General Motors had, because of McKnight's race, obstructed his efforts to enforce his contractual entitlements, for example by retaliating against him for bringing suit to enforce his contract of employment with General Motors, the company might be guilty of violating § 1981").

Similarly, in Mozee, the court affirmed the viability of a retaliation claim under § 1981 in cases where a plaintiff attempts to enforce rights guaranteed

in a contract through the legal process or through some nonjudicial method of adjudication. 940 F.2d at 1052.

In Von Zuckerstein, supra, the court held, without much discussion, that under Patterson, claims of discriminatory retaliation and demotion are not cognizable under § 1981.

The Fourth Circuit Court of Appeals, although now squarely siding with the majority of courts holding that retaliation claims are generally not actionable under Patterson, had noted that this position was not universally held. See Sampson v. Parker, 907 F.2d 1139 (4th Cir. 1990) (although declining to pass on the issue, the court noted that some circuits have held that such retaliation claims may be brought under § 1981 (citing Malhotra v. Cotter & Co., supra, 885 F.2d at 1312-13)).

Indeed, subsequent to this Court's decision in Patterson, it has been held that allegations of retaliation remain actionable because the "right to enforce contracts extends to private efforts to obstruct nonjudicial methods of adjudicating disputes involving discrimination." Jordan v. U.S. West Direct Co., 716 F. Supp. 1366 (D. Colo. 1989). The district court in Jordan explained this ruling as follows:

> Plaintiff alleges that he was retaliated against because he complained of discrimination and instigated an investigation regarding his charges. These allegations fall within the coverage afforded by the right to enforce contracts contained in § 1981.

Id. at 1368-69.

Several other courts have reached the same result. In Duse v. International Business Machines Corp., 748 F. Supp. 956 (D. Conn. 1990), the court sided with an emerging majority and held that retalia-

tory discharge claims are not actionable under Patterson as long as the employer's actions do not interfere with the employee's access to the courts. The court noted, however, that retaliation which inhibited an employee's ability to complain of or protest racially discriminatory policies was not precluded by Patterson:

> This is not to say, however, that an employee who is retaliated against for protesting conduct that is protected under § 1981, such as protesting a discriminatory denial of a promotion, cannot seek relief under the statute.
>
> . . . .
>
> . . . While the substantive rights protected under § 1981 may have been narrowed by the Supreme Court's recent decision in Patterson, there is nothing in that decision that undermines the policy supporting relief for those who have been retaliated against for "protesting policies squarely prohibited by § 1981." English v. General Development Corp., 717 F.Supp. 628, 632-33 (N.D.Ill. 1989).

Id. at 967; see also Coleman v. Dow Chemical Co., 747 F. Supp. 146 (D. Conn. 1990) (holding that negative performance evaluation which was motivated by retaliation for filing EEOC complaint alleging racially discriminatory denial of promotion stated claim under § 1981 under Patterson).

In Harvis v. Roadway Express Inc., 973 F.2d 490 (6th Cir. 1992), aff'd sub nom. Rivers v. Roadway Express, Inc., 114 S. Ct. 1510 (1994), the Sixth Circuit Court of Appeals held that claims by former employees that they had been discharged for successfully pursuing a grievance against the employer for its racially discriminatory employment practices were sufficiently related to contract formation and enforcement to be cognizable under § 1981. The court noted that the employees' claims were not based merely on the employer's discrimination against them in

conditions of employment, but on the employer's retaliation against them for enforcing contractual rights. Specifically, the employees had prevailed in a grievance on their suspension for refusing to attend a disciplinary hearing related to their accumulated work record. The basis for their refusal to attend was that they had been given inadequate notice of the hearings, and they contended that this lack of notice was racially motivated. Although the grievance resulted in an award of back pay for the suspension, the employees were later terminated. They contended that this termination was carried out in retaliation for their successful invocation of the grievance process, which was made necessary in the first instance by the employer's refusal to provide the employees with the same notice provided to white employees.

In holding that the employees had stated a claim under § 1981, the court stressed that "the prohibited conduct of impairing the ability to enforce contract rights is exactly what the appellants are complaining about here." 973 F.2d at 494. The employees, the court continued, were punished "for trying to utilize the established legal process for their grievances." Id.

As the discussion above shows, there is clearly a difference of opinion in the circuits regarding the contours of retaliatory conduct which remain actionable under the Patterson Court's construction of § 1981. The Fourth Circuit appears in the case at bar to have adopted a formalistic approach to this issue, holding that any claim alleging retaliation is, as a matter of law, not cognizable under Patterson.

The District Court granted Duke's motion to dismiss Count II of the Complaint, ruling that Battle could not maintain a claim of retaliation under 42 U.S.C. § 1981 in light of the Supreme Court's ruling in Patterson. The court of appeals affirmed this ruling without setting forth independent analysis.

Battle alleged in the Complaint, and argued in the courts below that Duke and its agents were motivated by a desire to retaliate against Battle for having complained of discrimination, for having filed an EEOC charge, and for ultimately obtaining relief in the form of an arbitrator's award and settlement agreement. Battle also alleged that Duke and its agents were motivated by racial discrimination (J.A. 9). In ruling on the motion to dismiss, the District Court completely failed to consider the allegations of racial discrimination, focusing instead

exclusively on the allegations of retaliation (J.A. 56-57). A fair reading of the Complaint, however, clearly indicates that throughout the events which serve as the basis for Battle's claims, Duke and its agents were motivated by a mixture of retaliation and racial discrimination. Indeed, the racial and retaliatory motives are, to a large extent, inseparable in light of the fact that Battle was, in the first instance, opposing Duke's racially discriminatory policies.

Furthermore, the District Court impermissibly restricted its view of the Complaint to allege merely conduct occurring after the execution of the Agreement of October 1987, and then only considered allegations relating to certain aspects of Duke's failure to perform as required under the Agreement (J.A. 57). Again, the facts alleged in the Complaint, and the reasonable inferences which must be drawn

therefrom, clearly indicate a much broader range of discriminatory conduct than that which the District Court considered.

Specifically, the facts alleged in the Complaint show a continuing effort by Duke to refuse to afford Battle the employment opportunities available to other professors. The Agreement itself, taken together with Duke's subsequent interpretation of the Agreement, indicate that while Duke did not refuse to enter into a contract for Battle's promotion, Duke clearly was willing to enter into such a contract only on discriminatory terms. Although under the plain meaning of the terms of the Agreement Duke agreed to promote Battle, the allegations in the Complaint clearly indicate that Duke never intended to promote Battle on the same terms as it promotes other, white professors (J.A. 9-10). And Duke has, indeed, taken the position that Battle's new sta-

tus as "Professor of the Practice" was not a tenure-track designation and was not a promotion from being a tenured associate professor (J.A. 10). Thus, although Duke promised Battle a promotion under the terms of the 1987 Agreement, Duke and its agents actually intended to, and did, recast the Agreement to allow, in practical effect, for Battle's demotion.

As the Second Circuit Court of Appeals has recognized in construing Patterson, § 1981 prohibits not only discriminatory refusals to enter into contracts but also offers to enter into a contract only on discriminatory terms. Gonzalez v. Home Insurance Co., 909 F.2d 716 (2d Cir. 1990). Moreover, it has been held that a refusal to allow an employee to perform a job agreed upon in an oral hiring agreement constitutes refusal to enter into a contract within the meaning of § 1981.

Jackson v. McCleod, 748 F. Supp. 831 (S.D. Ala. 1990).

In the case at bar, Duke led Battle to believe that, pursuant to the agreement, he would be promoted to a full professorship with the title of "Professor of the Practice." Yet, Duke admits indeed, asserts bravely that it never intended to actually promote Battle in the same manner or sense as it promoted regular white professors. Duke never intended, and steadfastly refused, to formally announce Battle's promotion, to recognize him as a full professor, to include Battle in University directories, or to afford Battle any of the terms and benefits given to white professors receiving similar promotions (J.A. 7-11). Thus, Duke and its agents entered into the Agreement with the intention of applying it in a discriminatory manner which would enable Duke to

continue its treatment of Battle as a second-class citizen because of his race.

This case presents a factual situation which underscores the need for guidance in the circuits on the issue which this Court left open in Patterson. Battle, and those similarly situated, who are found to be outside the protection of Title VII, have been left without a remedy in some circuits to redress retaliation for opposing racial discrimination. Review is therefore necessary to resolve the dispute and correct the misapplication of Patterson in some circuits, including the Fourth.

II. THE COURTS BELOW ERRED IN DECIDING THAT THE DEFENDANTS COULD NOT CONSPIRE TO DENY THE CIVIL RIGHTS OF THE PLAINTIFF IN VIOLATION OF 42 U.S.C. § 1985(3).

A. The Intracorporate Conspiracy Doctrine Does Not Apply To Conspiracy Claims Under 42 U.S.C. § 1985(3).

The District Court dismissed Battle's claim that the individual defendants and Duke University conspired to deprive him of his civil rights, in violation of 42 U.S.C. § 1985(3) (A-61-62). The court of appeals simply affirmed the district court's decision on this claim by reference to the lower court's opinion (A-8-9). The District Court based its decision to dismiss Battle's claim on the intracorporate conspiracy doctrine, holding that the individual defendants were incapable of forming a conspiracy with Duke University, because their actions were the actions of the University itself (A-61-62).

The intracorporate conspiracy doctrine was developed in the context of antitrust litigation, and its application to civil rights disputes has been questioned by almost every court that has had occasion to address the question. Several federal circuit courts of appeal have

rejected its application in the civil rights context altogether. The considerations that necessitated the need for the intracorporate conspiracy doctrine are absent in the civil rights context, and the doctrine fails to further the policies underlying 42 U.S.C. § 1985(3). The Court should take this opportunity to settle the confusion among the federal courts and declare the intracorporate conspiracy doctrine inapplicable to claims brought pursuant to § 1985(3).[5]

The Fifth Circuit Court of Appeals is credited with having first stated what has become known as the intracorporate conspiracy doctrine. Nelson Radio & Supply Co. v. Motorola, 200 F.2d 911 (5th Cir. 1952) [hereinafter Nelson]. The court

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[5]In Great American Federal Savings & Loan Association v. Novotny, 442 U.S. 366, 372 n.11 (1979), this Court assumed, but explicitly did not decide, that the directors of a single corporation can form a conspiracy within the meaning of § 1985(3).

created this doctrine in the context of antitrust law, in rejecting a claim brought under the Sherman Act, 15 U.S.C. § 1. Id. The intracorporate conspiracy doctrine, as decided in Nelson, was simply that two persons or entities are necessary for a conspiracy; a corporation cannot conspire with itself any more than a single individual can. Id. at 914. The court noted that only the corporation itself was named, and there was no allegation that the officers and agents of the corporation were acting in any way other than for the benefit of the corporation. Central to the court's decision was the realization that the plaintiff's claims rested "in the absurd assertion that the defendant, through its officers and agents, conspired with itself to restrain its trade in its own products." Id. (emphasis added). The court further illus-

trated the illogic of the plaintiff's position by stating:

> Surely discussions among those engaged in the management, direction and control of a corporation concerning the price at which the corporation will sell its goods, the quantity it will produce, the type of customers or market to be served, or the quality of goods to be produced do not result in the corporation being engaged in a conspiracy in unlawful restraint of trade under the Sherman Act.

Id. The decision by the court in Nelson was at all points in the discussion limited to the context of antitrust and restraint of trade.

Most other jurisdictions, including the Fourth Circuit, have since adopted the reasoning of Nelson in the context of antitrust claims. See, e.g., Greenville Publishing Co. v. Daily Reflector, Inc., 496 F.2d 391 (4th Cir. 1974). While this doctrine may or may not support the policies and considerations present in the law of antitrust, courts have been consid-

erably more reluctant to find that the intracorporate conspiracy doctrine should block corporate conspiracy claims in other areas of law. As the Fifth Circuit later noted, when the doctrine is extended to other contexts, precluding the possibility of intracorporate conspiracies, the original purposes and goals of the doctrine are not served. Dussouy v. Gulf Coast Investment Corp., 660 F.2d 594, 603 (5th Cir. 1981). Other courts have also recognized the limited application of the doctrine to other corporate conspiracy claims. See Novotny v. Great American Federal Savings & Loan Association, 584 F.2d 1235, 1258-59 (3d Cir. 1978), vacated on other grounds, 442 U.S. 366 (1979) [hereinafter Novotny] (collecting a long line of cases holding that where a corporation commits a substantive crime, the officers and directors who instigate the crime can be guilty of conspiracy).

One of the areas in which the purposes behind the intracorporate conspiracy doctrine are not served is civil rights. Several courts, however, have applied the doctrine to block claims alleging that individuals within a corporation conspired to violate civil rights. These decisions reflect the incompatibility of the doctrine in this context, as evidenced by the variety of exceptions and interpretations of the doctrine.[6] This Court should instead adopt the sound reasoning of the courts that have found the intracorporate conspiracy doctrine inapplicable in the civil rights arena, as the policies and considerations that support the doctrine

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[6]See, e.g., Hermann v. Moore, 576 F.2d 453 (2d Cir.), cert. denied, 439 U.S. 1003 (1978); Buschi v. Kirven, 775 F.2d 1240 (4th Cir. 1985); Johnson v. Hills & Dales General Hospital, 40 F.3d 837 (6th Cir. 1994); Travis v. Gary Community Hospital, 921 F.2d 708 (7th Cir. 1990), cert. denied, 112 S. Ct. 60 (1991); Cross v. General Motors Corp., 721 F.2d 1152 (8th Cir. 1983), cert. denied, 466 U.S. 980 (1984).

are not compatible with assuring the equal protection of minority rights.

In Novotny, supra, 584 F.2d at 1258-59, the Third Circuit Court of Appeals held that concerted action among the officers or agents of a corporation may constitute a conspiracy under § 1985(3). In so holding, the court first dispelled any notion that an employer cannot conspire with its employee. Id. at 1257 (citing Hyde v. United States, 225 U.S. 347, 367-68 (1912)). The court also took into consideration that the doctrine had not been applied to allegations of corporate conspiracies to violate other statutes, and cited this Court's opinion in Pennsylvania Railroad System & Allied Lines Federation No. 90 v. Pennsylvania Railroad, 267 U.S. 203 (1925), as recognizing the viability of a conspiracy composed of corporate officers. Novotny, supra, 584 F.2d at 1258.

The basis of the Nelson decision, the court went on to find, was a recognition of the policy of § 1 of the Sherman Act and a recognition of the needs and considerations faced when attempting to apply that law to a single corporation. The court recognized several important differences between the concerns that arise in antitrust litigation and those that arise in the context of a § 1985(3) claim. The court noted the reasoning in Nelson, supra, that "almost any decision by a corporation may have an effect on competitors, and thereby come within the purview of antitrust law," which necessitated the earlier court's decision to limit corporate exposure in that context. Novotny, supra, 584 F.2d at 1258 n.121. The Third Circuit Court of Appeals, however, found that the number of corporate decisions that impact equal rights is comparatively small, necessitating less protection. Id.

Further, the court recognized that while certain economic efficiencies will justify restraints on trade, no similar justifications "would protect a conjuration to deprive a minority of equal rights." Id. Based on the differences in policy and practical concerns, the court found no reason why the "concerted action by officers and employees of a corporation, with the object of violating a federal statute," cannot form the basis of a § 1985(3) complaint. Id. at 1258.

This reasoning was followed by the First Circuit Court of Appeals in Stathos v. Bowden, 728 F.2d 15 (1st Cir. 1984). In its decision the court reasoned that the evil to be prevented by § 1 of the Sherman Act occurs only when two different businesses join to make a decision, and that the same behavior engaged in within a single entity is both normal and legitimate. Id. at 21. This reasoning cannot

be applied where equal protection is at issue, for the prohibited conduct causes harm whether engaged in by a single entity or by the joint conduct of several entities. Id. The basic illogic that so troubled the court in Nelson is not present when it is alleged that corporate employees have conspired to violate another's civil rights. Because the considerations and policies behind the two areas of law are so different, the need for such an exception is not the same. Id.

Most recently, the Tenth Circuit Court of Appeals also rejected application of the intracorporate conspiracy doctrine in the context of a § 1985 conspiracy claim. Brever v. Rockwell International Corp., 40 F.3d 1119 (10th Cir. 1994). In agreeing with the cases cited above, the court held that "the doctrine, designed to allow one corporation to take actions that

two corporations could not agree to do, should not be construed to permit the same corporation and its employees to engage in civil rights violations." Id. at 1127.[7]

The case generally considered to be the first to apply the intracorporate conspiracy doctrine to a § 1985(3) claim is Dombrowski v. Dowling, 459 F.2d 190 (7th Cir. 1972). This decision, however, did little more than summarily conclude that the conspiracy requirement "is not satisfied by proof that a discriminatory business decision reflects the collective judgment of two or more executives of the same firm." Id. at 196. In its decision, the court noted that "agents of the [Ku Klux] Klan certainly could not carry out

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[7]See also Jacobs v. Board of Regents, 473 F. Supp. 663, 668 (S.D. Fla. 1979) ("The Court's judicial construction of 15 U.S.C. § 1 requiring two business entities in order to establish a conspiracy to restrain trade has little, if any, bearing upon the requirements of 42 U.S.C. § 1985(3)").

acts of violence with impunity simply because they were acting under orders from the Grand Dragon." Id. But neither the Dombrowski court nor subsequent decisions citing this same example have explained how a court can distinguish between an incorporated Klan and any other incorporated entity. Some courts have added the additional requirement that the court must examine the corporation's "mission." See, e.g., Johnson v. Hills & Dales General Hospital, 40 F.3d 837, 840 (6th Cir. 1994). This rationalization, however, fails to explain why a corporation formed for the purpose of discrimination should be subject to a § 1985(3) claim, while a corporation whose officers and employees subsequently decide, in concert, to practice discrimination will not be subject to such a claim.

Cooperation with regard to pricing, marketing, and production is necessary

within the corporate structure in order to maintain a healthy, competitive business. The court in deciding Nelson, supra, recognized this fact, and created the intracorporate conspiracy doctrine to protect such desirable behavior from the scope of § 1 of the Sherman Act. Cooperation with regard to prejudice, discrimination, and retaliation toward minorities is inimical to a healthy, competitive corporate structure. Application of the intracorporate conspiracy doctrine in this context serves only to shield undesirable, and illegal, conduct behind a corporate shroud.

The Petitioner urges this Court to take the opportunity presented by this case to resolve the uncertainty in the circuits over this issue. This Court should rule that the statutory requirements of § 1985(3) adequately protect legal behavior by corporations and their employees, and that it is contrary to the

purpose of the statute to categorically exempt conspirators from civil liability solely because of the nature of the business association.

B. The Courts Below Overlooked The Facts Of This Case And Controlling Law, Which, Taken Together, Mandate An Application Of An Exception To The Intracorporate Conspiracy Doctrine.

Even if the intracorporate conspiracy doctrine could generally be applied to Battle's conspiracy claim brought pursuant to § 1985(3), this Court should take the opportunity to correct the error in the courts below and hold that Battle has alleged acts that fall under one of the several recognized exceptions to the doctrine.

The appellate court affirmed the District Court's decision on this claim without further explanation, obviously overlooking the allegations contained in

Battle's Complaint. In reaching its conclusion, the District Court stated that "the only act alleged on the part of any of the individuals named as defendants was President Brodie's communication of Battle's status as a member of the faculty" (A-8-9); (A-61-62).

This purported resolution of the facts before it on the motion to dismiss was clearly in error. Because Battle's § 1985(3) claim was disposed of on a Rule 12(c) dismissal, the courts below were required to look no further than the pleadings and to view the allegations in the light most favorable to Battle. A court must refuse to dismiss a claim unless it appears that a plaintiff can prove no set of facts in support of his claim which would entitle the plaintiff to relief. Conley v. Gibson, 355 U.S. 41

(1957).[8] Battle's Complaint specifically alleged that the defendants, individually and collectively, acted to reveal the terms and conditions of the Agreement between Battle and Duke University, to deny Battle the rank of Professor of the Practice of Business Administration, to remove Battle's name from the directories and publications listing faculty in the Business School, and to deny Battle a suitable office and equipment. Battle alleged that the motivation behind all of these actions was discrimination because of Battle's race (J.A. at 7-9).

Although Battle alleged that the Respondents acted in a manner which deviated from the parties' 1987 Agreement, the Respondents cannot defeat Battle's claim

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[8]See also Hodgin v. Jefferson, 447 F. Supp. 804, 807 (D. Md. 1978) (individuals are not immune from liability under § 1985(3) merely because the same corporation employs them; the court must read the complaint liberally on a motion to dismiss).

by asserting, as they did below, that Duke complied with its contract. A racially motivated conspiratorial act complies with the specific terms of a contract does not insulate the conspirators, any more than the "employment-at-will" doctrine bars racial discharge claims.

These allegations, and the evidence offered by Battle to support them at this stage, do satisfy the exceptions recognized within the Fourth Circuit to the intracorporate conspiracy doctrine. In Buschi v. Kirven, 775 F.2d 1240, 1252-53 (\$th Cir. 1985), the Fourth Circuit Court of Appeals recognized two exceptions that soften the broad application of this doctrine. First, the court recognized that "'an exception may be justified when the officer has an independent personal stake in achieving the corporation's illegal objective.'" Id. at 1252-53 (quoting Greenville Publishing Co. v. Daily Reflec-

tor, Inc., supra, 496 F.2d at 399). A second exception is recognized for the unauthorized actions of an employee in furtherance of a conspiracy. Buschi, supra, 775 F.2d at 1252-53.

In its decision in Buschi v. Kirven, where the court found that the plaintiff's claim did not fall under these exceptions, the court stressed that the plaintiff had not alleged that the defendants were personally involved in the wrongful act. The parties named by Battle in the present action were intimately involved with Battle's discrimination complaints from the start, and were directly responsible for the retaliation that forms the basis of the present claim. Moreover, the actions alleged by Battle represent severe deviations from the Agreement. Because this Agreement was to be the official expression of Duke University's policy toward Dr. Battle for the remainder of his as-

sociation with the University, any deviations from that Agreement by individual employees or agents must represent actions unauthorized by University policy.[9]

Battle's claim satisfies both recognized exceptions to the intracorporate conspiracy doctrine. To apply this doctrine to bar Battle's claims demonstrates that the courts below either overlooked the body of law relating to these exceptions, or abandoned any pretense of applying these exceptions. The Court should find at a minimum that if the intracorporate conspiracy doctrine does apply to claims brought pursuant to § 1985(3), the application of recognized exceptions to the doctrine prevents its application

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[9]See also Rackin v. University of Pennsylvania, 386 F. Supp. 992 (E.D. Pa. 1974) (recognizing exceptions to the intracorporate conspiracy doctrine, and noting the special interest in maintaining equal opportunity in the educational setting).

under the facts alleged by Battle in the present claim.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that this Court grant this Petition and issue a Writ of Certiorari to the Fourth Circuit Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 11th day of September, 1995, pursuant to counsel's instructions, I mailed by certified mail, return receipt requested, FORTY (40) copies of the foregoing Petition for Writ of Certiorari and Appendix to Writ to the Clerk's Office of the Supreme Court of the United States, and mailed by first class United States mail, postage prepaid, THREE (3) copies to counsel of record for the Respondent, John M. Simpson and Sally P. Paxon, FULBRIGHT & JAWORSKI, L.L.P., 801 Pennsylvania Avenue, N.W., Washington, DC, 20004.

Wanda Tokarz

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1995

JOSEPH BATTLE,

Petitioner,

v.

DUKE UNIVERSITY, H. KEITH H. BRODIE,
THOMAS F. KELLER, and RICHARD STAELIN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

APPENDIX

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JOSEPH BATTLE, Plaintiff-Appellant, v. DUKE UNIVERSITY; H. KEITH H. BRODIE; THOMAS F. KELLER; RICHARD STAELIN, Defendants-Appellees.	No. 93-2128

Appeal from the United States District Court for the Middle District of North Carolina, at Durham.
Norwood Carlton Tilley, Jr., District Judge.
(CA-90-512)

Argued: April 3, 1995

Decided: May 15, 1995

Before RUSSELL, WILKINS, and MICHAEL, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Richard Woodson Rutherford, ANDERSON, RUTHERFORD, GEIL & SCHERER, L.L.P., Raleigh, North Carolina, for Appellant. Sally Patricia Paxton, FULBRIGHT & JAWORSKI, L.L.P., Washington, D.C., for Appellees.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Joseph Battle appeals the decisions of the district court dismissing most of his claims and granting summary judgment on the remaining claim in favor of Duke University (Duke) and certain of its officials.[1] We affirm.

I.

Battle, a black male, was hired by Duke as an associate professor in the Fuqua School of Business in 1970. He complained in the early 1980s that he was the victim of racial discrimination, which resulted in his receiving compensation for

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[1]The officials were President H. Keith H. Brodie, Fuqua School of Business Dean Thomas F. Keller, and Fuqua School of Business Associate Dean Richard Staelin.

salary inadequacies. Battle complained anew of racial discrimination and filed a charge with the Equal Employment Opportunity Commission (EEOC) in January 1986. The parties settled this claim in an agreement dated October 21, 1987 (the Agreement).

Under the Agreement, all of Battle's teaching duties and other responsibilities at Duke were terminated, and he relinquished any right to employment compensation or other benefits. In exchange, Battle received a financial settlement consisting of a lump-sum award and monthly payments over eight years. The Agreement also provided that the title "Professor of the Practice of Business Administration" would be conferred upon Battle for a period of three years, after which his title would become "Professor Emeritus of the Practice of Business Administration," although Battle had no duties or responsi-

bilities under either title. The Agreement further allowed Battle to maintain an office on campus of Duke's choosing for up to eight years to use as Battle wished, along with a computer containing certain technical features. Within months of signing the Agreement, Battle was employed by North Carolina Central University where he later became a tenured professor.

In January 1988, Battle complained that he had not been officially notified of his new title and that it had not been publicly announced to the business school faculty. Battle also expressed discontent concerning the elimination of his secretarial assistance. He further complained that the computer was not received timely, was in poor condition, and did not meet all of the agreed specifications. Later, he alleged that Brodie breached a confidentiality provision of the Agreement by telling black faculty members at a meeting

in May 1988 that Battle was leaving Duke in response to a question inquiring why Battle was not invited to the meeting.

When Duke moved Battle's office from the Fuqua School of Business to another building in the fall of 1988, Battle complained that mail service was not arranged for him there and that he received mail only after it was forwarded from the business school to his home address. Also, Battle asserted that Duke never provided him with a new computer after he moved. He additionally complained in October 1989 and subsequently that his name was not included in several publications and catalogues of the Fuqua School of Business that listed the names of faculty members.

Battle filed an EEOC charge in April 1990. After concluding that it lacked jurisdiction because no employment relationship existed between Duke and Battle,

the EEOC issued a right-to-sue letter. Battle then filed this action in October 1990, alleging: retaliation in violation of § 704(a) of Title VII of the Civil Rights Act of 1964, see 42 U.S.C.A. § 2000e-3(a) (West 1994); racial discrimination and retaliation in violation of 42 U.S.C.A. § 1981 (West 1981); conspiracy in violation of 42 U.S.C.A. § 1985(3) (West 1994); unfair and deceptive trade practices in violation of N.C. Gen. Stat. § 75-1.1 (Michie 1994); and breach of contract.

II.

The district court dismissed most of Battle's claims under Federal Rule of Civil Procedure 12(c). First, the district court concluded that the actions Battle claimed violated § 1981 were not actionable because they occurred after the formation of the contract and because they did not interfere with Battle's ability to

enforce his contractual rights. See Patterson v. McLean Credit Union, 491 U.S. 164, 176-78 (1989).[2] Next, the district court dismissed the conspiracy claim under § 1985(3) because corporate agents generally cannot conspire with a corporation

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[2]The district court also found, and the Supreme Court later conclusively established, that the 1991 amendment to § 1981 does not apply retroactively. See Rivers v. Roadway Express, Inc., 114 S. Ct. 1510, 1519 (1994) ("Patterson provides the authoritative interpretation of the phrase 'make and enforce contracts' in the Civil Rights Act of 1866 before the 1991 amendment went into effect on November 21, 1991.").

Battle attempts to escape the import of Patterson on this claim by additionally alleging—for the first time on appeal—that conduct of Duke and its officials subsequent to the signing of the Agreement indicates that Battle was denied a promotion in his employment with Duke. See Patterson, 491 U.S. at 185 (promotion claim actionable under § 1981 only when "the promotion rises to the level of an opportunity for a new and distinct relation between the employee and the employer"). We decline to address this argument because it was not raised in the district court, and Battle has not argued that exceptional circumstances exist to justify our consideration of this issue. See Muth v. United States, 1 F.3d 246, 250 (4th Cir. 1993).

(or, as here, an educational corporation) and because Battle failed to allege actions that would qualify as conduct outside the scope of any of the named agents' employment. See Buschi v. Kirven, 775 F.2d 1240, 1251-53 (4th Cir. 1985). Also, the district court dismissed the claim of unfair and deceptive trade practices, ruling that the Agreement and the conduct of Duke officials on which Battle relied did not affect commerce. See N.C. Gen. Stat. § 75-1.1(b). After discovery, the district court granted summary judgment on the Title VII claim, concluding that it was barred because Battle had failed to establish an independent discriminatory act that occurred within the 180-day period prior to the filing of the EEOC charge in April 1990 and that this failure defeated his claim under the continuing violation doctrine. See Woodard v. Lehman, 717 F.2d 909, 915 (4th Cir. 1983)

("It is only where an actual violation has occurred within [the] requisite time period that under any possible circumstances the theory of continuing violation is sustainable."). Finally, it dismissed without prejudice the breach of contract claim to allow Battle to file that cause of action against Duke in state court. Battle v. Duke Univ., C/A No. 1:90CV00512 (M.D.N.C. Aug. 5, 1991) (dismissal order); Battle v. Duke Univ., C/A No. 1:90CV00512 (M.D.N.C. July 28, 1993) (summary judgment order).

After careful consideration, we agree with the result reached by the district court and affirm.[3]

AFFIRMED

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[3]Given our disposition of this case, we need not consider an issue not reached by the district court: whether Battle was an "employee" of Duke within the meaning of Title VII after the effective date of the Agreement. See 42 U.S.C.A. § 2000e(f) (West 1994).

ENTERED ON DOCKET
R. 79(a)
JUL 29 1993
BY: W.W.

FILED
JUL 28 1993
IN THIS OFFICE
Clerk, U.S. District Court
Greensboro, N.C.
By .....

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

JOSEPH BATTLE, Plaintiff,	)	Case No.
vs.	)	1:90CV00512
DUKE UNIVERSITY, H. KEITH H. BRODIE, THOMAS F. KELLER, and RICHARD STAELIN, Defendants.	)	

ORDER

For the reasons stated in the memorandum opinion filed contemporaneously herewith, IT IS ORDERED that Plaintiff Battle's motion to reconsider the dismissal of Count II of the complaint is DENIED, and Defendants' motion for summary judgment is GRANTED as to Count I, and Count V is dismissed pursuant to 28 U.S.C. § 1367(c).

This, the 28th day of July, 1993.

/s/
United States District Judge

FILED
JUL 28 1993
IN THIS OFFICE Clerk, U.S. District Court
Greensboro, N.C.
By .....

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

JOSEPH BATTLE, Plaintiff,	)	Case No. 1:90CV00512
vs.	)	
DUKE UNIVERSITY, H. KEITH H. BRODIE, THOMAS F. KELLER, and RICHARD STAELIN, Defendants.	)	

MEMORANDUM OPINION

TILLEY, District Judge

This case is before the Court on the motions of plaintiff Joseph Battle ("Battle") to reconsider the dismissal of Count II of his complaint, and of defendants Duke University ("Duke"), H. Keith H. Brodie, Thomas F. Keller, and Richard Staelin for summary judgment on Count I and Count V of Plaintiff's complaint. On Aug. 5, 1991, Senior Judge Ward dismissed

Counts II, III, IV as to all Defendants, and Count V as to the individual Defendants Brodie, Keller, and Staelin, were dismissed by Senior Judge Ward of the Middle District of North Carolina. Count I is a claim for relief under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) et seq. (1988); Count II is a claim for relief under the Civil Rights Act of 1866, 42 U.S.C. § 1981; and Count V alleges that defendants breached a settlement agreement signed by Plaintiff and Duke in October, 1987. For the reasons stated below, Plaintiff's motion to reconsider the dismissal of Count II is DENIED, Defendants' motion for summary judgment is GRANTED as to Count I, and Count V, a state claim pending under the Court's supplemental jurisdiction, is dismissed without prejudice to the Plaintiff's refiling in the appropriate state forum.

I. FACTUAL BACKGROUND

Joseph Battle, a black male, was hired by Duke University as an Associate Professor in the Fuqua School of Business in 1970. Beginning in the early 1980's, Battle began to make various complaints of racial discrimination. These complaints included charges of racial discrimination in salary, administrative evaluation procedures, and selection of teaching and committee assignments.

As a result of Battle's continued complaints of racial discrimination, Duke University and Battle agreed to have Battle's complaints submitted to an arbitrator, who found that there was merit to some of Battle's complaints. Consequently, the arbitrator awarded Battle $500,000 for damage to his professional reputation and an additional $500,000 in the event of an act of retaliation by Duke.

After the arbitrator's ruling in favor of Battle, Duke brought an action in the United States Court for the Middle District of No h Carolina seeking to reduce the arbitrator's award. The court vacated the two $500,000 awards, but upheld the arbitrator's ruling in favor of Battle on the salary claim. After the court's decision, Battle continued to make racial discrimination charges against Duke. In January, 1986, Battle filed a racial discrimination charge with the Equal Employment Opportunity Commission ("EEOC"). The EECC dismissed the charge in June, 1987, after Duke agreed to offer Battle "full relief" under Title VII. On October 21, 1987, Battle and Duke signed a settlement agreement ("Agreement"), resolving Battle's racial discrimination claims against Duke.

The Agreement provided that Duke pay Battle $24,247.00 for back pay plus inter-

est and $127,819.00 as partial payment in settlement of Battle's pain and suffering arising from his claims of racial discrimination. The remainder of the payments were to be paid in monthly installments beginning on October 1, 1987 and continuing until June 30, 1995.

In addition to these payments, Duke also agreed to provide Battle with office space generally comparable to the space Battle then occupied. The parties agreed that the office space could be located in any building at Duke. Duke further agreed to supply Battle with "customary furnishings" and an I.B.M. computer with certain specifications.[1] Duke also agreed to

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[1]Under the Agreement Duke was to provide Battle with "an I.B.M. personal computer with customary software and the following features:

a) 640k memory
b) Color graphs monitor adaptor
c) Color monitor
d) Two diskette drives
e) Parallel and serial ports
f) 8087 math co-processor
g) Dot matrix printer."

"promote Battle to the rank of Professor of the Practice of Business Administration." Agreement, ¶ 7.

In return, Battle agreed to an immediate "personal leave of absence without employment duties, responsibilities or obligations of any sort." Id. ¶ 6. The parties further agreed that Battle's "employment compensation and eligibility to participate in any fringe benefit program offered by Duke shall terminate and cease forever." Id. ¶ 6. In addition, Battle agreed to officially retire from the Duke faculty three years following the execution of the Agreement (October 27, 1990), at which time Duke would designate Battle as Professor Emeritus of the Practice of Business Administration. Id. ¶ 8.

As called for in the Agreement, Duke has made the monthly payments to Battle,

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Agreement, ¶ 9.

the Board of Trustees has approved Battle's new rank of Professor of the Practice of Business Administration, and Battle's personal leave of absence became effective November 6, 1987. However, within months after the Agreement was executed, Battle began to make several complaints regarding Duke's performance of the Agreement. Battle now asserts that Duke has delayed execution of the Agreement in retaliation for his past complaints of racial discrimination. Generally, Battle claims that Duke failed to properly "announce" his promotion, failed to provide him with secretarial assistance, delivered a computer that was "inoperable, dirty and shopworn," mishandled Battle's mail, omitted Battle's name from certain faculty directories, and breached the confidentiality section of the Agreement.

On October 9, 1990, Battle filed a complaint in the United States District Court for the Middle District of North Carolina alleging charges of racial discrimination against Duke University. Battle's complaint included three counts of racial discrimination in violation of federal law, one count of unfair trade practices, and one count of breach of contract.[2]

II. PLAINTIFF'S MOTION TO RECONSIDER THE DISMISSAL OF COUNT II

On August 5, 1991, Senior Judge Ward granted motions of the Defendants to dismiss Counts II, III, IV, and part of V of Plaintiff's complaint. Count II was a

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[2]Count I is a claim for relief under the Civil Rights Act of 1964, Title VII. Count II is a claim for relief under the Civil Rights Act of 1866, 42 U.S.C. § 1981. Count III is a claim for relief under 42 U.S.C. § 1985(3). Count IV is a claim for relief under N.C.Gen.Stat. § 75-1.1. Count V is a claim for relief for breach of contract.

claim for relief under the Civil Rights Act of 1866, 42 U.S.C. § 1981. The court found that Plaintiff had failed to state a cause of action under 42 U.S.C. § 1981 as that statute had been interpreted by the Supreme Court in Patterson v. McLean Credit Union, 491 U.S. 164 (1989).

At the time the counts were dismissed, 42 U.S.C. § 1981 provided in whole:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pain, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981 (a). In Patterson, the Supreme Court restricted the scope of 42 U.S.C. § 1981 to the "making and enforcement" of contracts. The Court stated:

> The most obvious feature of the provision is the restriction of its scope to forbidding discrimination in the 'mak[ing] and enforce[ment]' of contracts alone. Where an alleged act of discrimination does not involve the impairment of one of these specific rights, § 1981 provides no relief. Section 1981 cannot be construed as a general proscription of racial discrimination in all aspects of contract relations, for it expressly prohibits discrimination only in the making and enforcement of contracts.

Patterson, 491 U.S. at 176 (1989).

On November 21, 1991, the Civil Rights Act of 1991 was signed into law. Pub. L. No. 102-166 (1991). In response to the Supreme Court's decision in Patterson, Section 101 of this Act added subsection (b) to 42 U.S.C. § 1981, expanding the definition of "make and enforce" contracts to include the "making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of

the contractual relationship." 42 U.S.C. § 1981(b).

On December 5, 1991, Plaintiff filed a motion to reconsider the court's dismissal of Count II. Plaintiff argues that Section 101 of the Civil Rights Act of 1991 ("Section 101") reverses the result in Patterson v. McLean Credit Union, supra, and should be applied retroactively to his § 1981 claim, thus reinstating Count II of the complaint. If Section 101 applies retroactively to Plaintiff's § 1981 claim, Count II of the complaint must be reinstated. However, if Section 101 does not apply retroactively, Patterson governs Plaintiff's § 1981 claim, and Count II of the Plaintiff's complaint may not be reinstated. Thus, the specific issue before the Court is whether Section 101 of the Civil Rights Act of 1991 applies retroactively to Plaintiff's § 1981 claim.

A. Statutory Retroactivity

There is conflicting Supreme Court authority concerning statutory retroactivity. In Thorpe v. Housing Auth. of the City of Durham, 393 U.S. 268 (1969), and again in Bradley v. Richmond School Bd., 416 U.S. 696 (1974), the Supreme Court held that a new statute must be retroactively applied in a pending case "unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." Bradley, 416 U.S. at 711. However, in Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988), the Supreme Court stated "[r]etroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." Bowen, 488 U.S. at 204.

Two years after the Bowen decision, the Supreme Court recognized the split in the Bradley and Bowen decisions in Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827 (1990). The Kaiser court refused to reconcile the split in the two lines of precedent because the statute involved manifested a clear congressional intent against retroactive application. Kaiser, 494 U.S. at 837-39.

The Fourth Circuit has applied both the Bradley and Bowen cases to reach conflicting outcomes concerning statutory retroactivity. In U.S. v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988), cert. denied, 490 U.S. 1106 (1989), a case decided three months before the Bowen decision, the Fourth Circuit followed the Bradley reasoning and applied the Comprehensive Environmental Response, Compensation, and Liability Act retroactively. Monsanto, 858 F.2d at 175-76. However, in Leland v.

Federal Ins. Adm'r, 934 F.2d 524 (4th Cir.), cert. denied, 112 U.S. 417 (1991), decided after the Supreme Court's decision in Bowen, the Fourth Circuit stated "[i]t is a fundamental and well established principle of law . . . that statutes are presumed to operate prospectively unless retroactive application appears from the plain language of the legislation." Leland, 934 F.2d at 527, citing Bowen v. Georgetown University Hospital, supra.

Plaintiff argues that the Supreme Court's decision in Bennett v. New Jersey, 470 U.S. 632, 639 (1985), suggests a reconciliation of the two conflicting lines of cases.[3] In that case, the Supreme Court noted that the Bradley reasoning did not apply to statutes affecting substantive rights and liabilities, absent

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[3]The Court notes that the Bennett decision cannot explicitly reconcile the Bradley and Bowen cases since it was decided in 1985, three years before the Bowen decision.

express congressional intent. The Supreme Court noted that the Bradley rule was limited by "another venerable rule of statutory interpretation, *i.e.*, that statutes affecting substantive rights and liabilities are presumed to have only prospective effect." Bennett, 470 U.S. at 639. Thus, under Bradley, Bennett, and Bowen, a statute affecting substantive obligations or rights will have only prospective effect unless there is clear legislative intent to the contrary.

The Court finds that Section 101 of the Civil Rights Act of 1991 affects substantive rights. Under Patterson, § 1981 did not prohibit discrimination in all aspects of contractual relations. Section 101 extended § 1981 to the 'making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C.

§ 1981(b). Because Section 101 affects substantive rights, it does not apply to conduct that occurred prior to its enactment, unless there is clear legislative intent of retroactivity.

B. The Civil Rights Act of 1991

The determination of whether Congress intended Section 101 of the Civil Rights Act of 1991 to be applied retroactively must begin with the language of the Act. Sections 402(a) and (b) of the Act state:

> SEC. 402. EFFECTIVE DATE
> (a) IN GENERAL. - Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment.
> (b) CERTAIN DISPARATE IMPACT CASES. - Notwithstanding any other provision of this Act, nothing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983.

The only other language of the Act pertaining to retroactivity is found in Sec-

tion 109(c), which applies to Americans working abroad. Section 109(c) provides:

> (c) APPLICATION OF AMENDMENTS. - The amendments made by this section shall not apply with respect to conduct occurring before the date of the enactment of this Act.

Plaintiff argues that because Sections 402(b) and 109(c) contain language prohibiting retroactivity and Section 402(a) does not contain similar language, Section 402(a) should be interpreted to require retroactive application of Section 101.

The Court finds the omission of explicit language prohibiting retroactivity in Section 402(a) is not dispositive of the issue. The omission of specific retroactive language in Section 402(a) is not indicative of a legislative intent to apply Section 101 of the Civil Rights Act of 1991 retroactively. The plain meaning of § 402 is that the Civil Rights Act of 1991 took effect upon the date of enactment, November 21, 1991, and therefore,

has no retroactive effect on events occurring prior to its enactment. The language of the Act does not indicate that Congress intended the Civil Rights Act of 1991 to apply retroactively to events that occurred prior to its enactment.

The legislative history of the Civil Rights Act of 1991 also does not indicate clear Congressional intent to apply Section 101 retroactively. Two proposed versions of the Civil Rights Act, one including a specific retroactive provision and one including a specific prospective provision, both failed to become law.[4] The version of the Civil Rights Act, amending § 1981, that did become law, contained no specific retroactive or prospective language. Furthermore, the Congressional Record includes floor debates

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[4]The two versions of the Civil Rights Act that failed to become law are the Civil Rights Act of 1990 and the Administrative Bill, the bill originally introduced into Congress.

and interpretive memoranda which could support both retroactive and prospective application of the Act. Thus, the Court finds that neither the language nor the legislative history of the Civil Rights Act of 1991 indicate a clear legislative intent that Section 101 apply retroactively.

Although the Fourth Circuit has not specifically ruled on the issue, the Equal Employment Opportunity Commission and a majority of Circuit Courts of Appeals that have addressed the issue of the retroactivity of Section 101 have held that it does not apply retroactively to acts occurring before its enactment.[5]

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[5]See "EEOC Policy Guidance on Retroactivity of Civil Rights Act of 1991;" Harvis v. Roadway, 973 F.2d 490 (6th Cir. 1992); Luddington v. Indiana Bell, 966 F.2d 225 (7th Cir. 1992); Mozee v. American Commercial Marine Service Company, 963 F.2d 929 (7th Cir. 1991), cert. denied, 113 S.Ct. 207 (1992); Johnson v. Uncle Ben's, 965 F.2d 1363 (5th Cir. 1992); Fray v. Omaha World Herald, 960 F.2d 1370 (8th Cir. 1992); Baynes v. AT & T Technologies,

This Court holds that 42 U.S.C. § 1981, as amended by Section 101 of the Civil Rights Act of 1991 does not apply retroactively to pending cases. Retroactive application of § 1981 would "defeat substantial reliance interests of employers." Luddington v. Indiana Bell Telephone Co., 966 F.2d 225, 229 (7th Cir. 1992). The alleged discrimination in Count II of Plaintiff's complaint occurred before the Civil Rights Act of 1991 was enacted. Therefore, Plaintiff's § 1981 claim is governed by Patterson's interpretation of the former 42 U.S.C. § 1981. Plaintiff's claim which was excluded by Patterson v. McLean Credit Union is not resurrected by the passing of the Civil Rights Act of 1991.

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976 F.2d 1370 (11th 1992); Gersman v. Group Health Ass'n, Inc., 975 F.2d 886 (D.C.Cir. 1992); But see, Davis v. City and County of San Francisco, 976 F.2d 1536 (9th Cir. 1992).

Plaintiff argues that justice requires that Section 101 apply retroactively to his § 1981 claim since Patterson was applied retroactively to dismiss that claim. This argument is without merit. There is an important distinction between retroactive application of Supreme Court decisions and statutory retroactivity. Courts must apply "retroactively any relevant interpretation of § 1981 *by the Supreme Court.*" Williams v. First Union National Bank, 920 F.2d 232, 235 (4th Cir. 1990), cert. denied, 111 S.Ct. 2259 (1991) (emphasis added). However, "the first rule of construction is that *legislation* must be considered as addressed to the future, not to the past." Security Industrial Bank, 459 U.S. 70, 79 (1982) (emphasis added). Thus, Patterson was correctly applied retroactively to dismiss Plaintiff's § 1981 claim. However, Section 101 cannot be applied retroactively because it

is a statute affecting substantive rights, and therefore must be "addressed to the future."

Finally, Plaintiff argues that Section 101 must apply to defendants' discriminatory conduct after November 21, 1991, the effective date of Section 101. Because Plaintiff only alleges "continued discriminatory acts" without reference to any specific act which occurred after the effective date of Section 101, the Court assumes Plaintiff is referring to the alleged violations of the 1987 Agreement: (1) failure to properly announce Battle's promotion; (2) failure to provide secretarial assistance; (3) breach of the confidentiality clause; (4) failure to provide a working computer; (5) improper handling of mail; and (6) omission of Battle's name from various directories. Without deciding whether these allegations constitute "continued discriminatory

acts," the Court finds that these acts could not "continue" subsequent to October 27, 1990. According to the 1987 Agreement, Battle was to retire from the Duke faculty three years after the commencement of the Agreement. Because of this, the secretary, confidentiality, computer, mail, and directory issues could only constitute a "continuing discriminatory act" until Battle's retirement in 1990. Regarding the "announcement issue," the Court finds that according to the Agreement, Duke was under no obligation to announce Battle's promotion, and therefore, this is not an issue. Consequently, even assuming discriminatory acts by the Defendants, there are none which continued subsequent to November 21, 1991, the effective date of the Civil Rights Act of 1991.

Furthermore, mere continuity is not sufficient to support a claim under §

1981; the relevant inquiry is whether violations of § 1981 have occurred. Title VII actions require a discriminatory act within the relevant time period. See United Air Lines v. Evans, 431 U.S. 553, 558 (1977). Rights asserted under Title VII are similar to rights asserted under § 1981.[6] United States v. Burke, 112 S.Ct. 1867, 1880 (1992). Therefore, in order to maintain his § 1981 action, Plaintiff must point to a specific discriminatory act occurring after the effective date of the Civil Rights Act of 1991. Plaintiff is unable to do this, therefore Section 101 does not apply to the alleged discriminatory effects continuing after November 21, 1991. Because Section 101 of the Civil Rights Act of 1991 does not apply retroactively to Battle's § 1981 claim, there is

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[6]The difference is that Title VII governs employment discrimination and § 1981 governs discrimination in the making and enforcement of contracts.

no merit to Battle's motion to reconsider the dismissal of Count II of his complaint.

III. DEFENDANTS' MOTION FOR SUMMARY JUDGEMENT ON COUNTS I AND V

To be successful on a motion for summary judgment, the movant must "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56 (c). The court must draw all justifiable inferences in favor of the non-moving party and against the moving party because "[c]redibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Because the standard for considering a motion for summary judgment mirrors the standard for what has

traditionally been known as a "directed verdict,"[7] the standard can also be expressed as follows: "whether, viewing the evidence in the light most favorable to the non-moving party and giving him the benefit of all reasonable inferences, there is sufficient evidence in the record to support a jury verdict in his favor." Harold v. Hajoca Corp., 864 F.2d 317 (4th Cir. 1988), cert. denied, 490 U.S. 1107, 109 S.Ct. 3159, 104 L.Ed.2d 1022 (1989).

A. COUNT I

Count I is a claim for relief under Title VII of the Civil Rights Act of 1964. According to section 703(a) of Title VII, 42 U.S.C. § 2000e-2(a), it is unlawful for an employer

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate

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[7]The concept is now termed "judgment as a matter of law." See Fed. R. Civ. P. 50(a).

> against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a). Defendants argue that they are entitled to summary judgment as to Count I because: (1) there is no employer-employee relationship between Duke and Battle, as required by Title VII; (2) Count I is barred because Battle failed to file his racial discrimination claim with the Equal Employment Opportunity Commission ("EEOC") within the limitations period; and (3) Battle cannot establish a prima facie case of retaliation under Title VII. Because Battle's Title VII claim will be barred if it was

not filed with the EEOC within the limitations period, that issue will be addressed first.

As a general rule, a racial discrimination charge must be filed with the EEOC within 180 days of the alleged discriminatory act. EEOC v. Commercial Office Products, 486 U.S. 107, 110 (1988), 42 U.S.C. § 2000e-5(e).[8] The 180 day period "guar-

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[8]Title 42 U.S.C. § 2000e-5(e)(1) states:

> (1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter . . . . [except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within

antees the protection of the civil rights laws to those who promptly assert their rights, [and] also protects employers from the burden of defending claims arising from employment decisions that are long past." Delaware State College v. Ricks, 449 U.S. 250, 256-57 (1980).

In determining whether a racial discrimination charge has been timely filed, "the proper focus is upon the time of the *discriminatory acts*, not upon the time at which the *consequences* of the acts became most painful." Id. at 258. The proper inquiry is whether there has been a distinct discriminatory act within the limitations period. United Air Lines, 431 U.S. at 558 (1977). The Fourth Circuit has held that civil rights claims must be

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thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.]

dismissed when no discriminatory acts occurred within the limitations period. McCausland v. Mason County Bd. of Ed., 649 F.2d 278, 279 (4th Cir. 1981).

Some courts have recognized a "continuing violation" exception to the Evans and Ricks rule that a distinct discriminatory act must occur within the limitations period. In order to fall within the continuing violation exception, a complainant must show "a series of related acts, one or more of which falls within the limitations period, or the maintenance of a discriminatory system both before and during the [limitations] period." B. Schlei & P. Grossman, Employment Discrimination Law 232 (Supp. 1979). The Fourth Circuit has held that "[i]t is *only* where an actual violation has occurred within that requisite time period that under any possible circumstances the theory of continuing violation is sustainable." Wood-

ward v. Lehman, 717 F.2d 909, 915 (4th Cir. 1983). Thus, even under the continuing violation exception to the Evans and Ricks rule, a complainant must at least show a discriminatory act which occurred within the limitations period.

Battle filed his racial discrimination charge with the EEOC on April 8, 1990. Thus, Battle must point to a discriminatory act which occurred on or after October 8, 1989, 180 days prior to the EEOC filing, in order to maintain his Title VII claim. For purposes of the limitations period, it is necessary to identify the alleged discriminatory acts and the dates upon which they occurred.

Battle has alleged six discriminatory acts by defendants in their performance of the Agreement: (1) failure to properly announce his promotion to Professor of the Practice of Business Administration; (2) failure to provide secretarial and re-

search assistance; (3) failure to provide a clean and properly working computer; (4) mishandling of his mail; (5) omission of his name from certain faculty directories; and (6) breach of the confidentiality agreement. Although Battle complained of many of these acts within the limitations period, all of these alleged discriminatory acts occurred prior to October 8, 1989, thus barring Battle's Title VII action.

First, Battle complains that his promotion was not properly announced. Battle believes that his promotion should have been announced following the November 6, 1987 Board of Trustees meeting. Battle Dep. 357-58. Next, Battle complains about the denial of secretarial and research assistance in February, 1988. Pl. Exh. 19. In February and September 1988, Duke told Battle that he was not entitled to such support under the Agreement. Defs.

Dep. Exh. 11. Battle further complains that defendant Brodie breached the confidentiality agreement during a black faculty meeting in May, 1988. Defs. Dep. Exh. 15. In September 1988, Duke agreed to provide Battle with a new computer. Defs. Dep. Exh. 34. Duke notified Battle that the new computer was ready for installation in October and November 1988. Defs. Dep. Exh. 36. Battle never arranged for its installation. In October, 1988, Battle complained about his office move. Pl. Answers to Defs. Requests for Admission. Battle was informed in December 1988 how to correct his mail problems caused by the move to his new office. Defs. Dep. Exh. 16. Finally, his complaint about the omission of his name from certain faculty directories was made on October 2, 1989. Defs. Dep. Exh. 38. Finally, Battle's deposition testimony reveals that the latest catalogue in which his name was

omitted came out in March 1989. Defs. Dep. Exh. 43. Thus, Defendants have shown that all of the discriminatory acts alleged in the complaint occurred outside the limitations period.

In his response to Defendants' motion for summary judgment, Battle does not dispute any of the dates of the alleged discriminatory acts. Thus, it appears that all parties agree that all of the alleged discriminatory acts included in Battle's complaint occurred prior to October 8, 1989, the beginning of the 180 day limitations period for Battle's Title VII claim. However, Battle states that the most recent act of discrimination occurred within the last two weeks prior to his EEOC filing. Without revealing the nature of latest alleged discriminatory act, Battle refers to the EEOC charges which state that the latest discriminatory act occurred on or about March 1, 1990. How-

ever, Battle's deposition testimony reveals that the discriminatory act which Battle claims occurred on March 1, 1990, was in fact Duke's failure to make a public announcement acknowledging that Battle was a tenured full professor. Battle believes that this announcement should have been made following the November 6, 1987 Board of Trustees meeting. Battle Dep., 357-58. Battle only claims that his promotion had still not been properly announced by March 1, 1990. Thus, it is clear that no discriminatory act occurred on March 1, 1990.

In the EEOC charge Battle also reiterates his claim that his name had been omitted from certain faculty directories. Battle originally made this complaint on October 2, 1989, prior to the beginning of the limitations period. Battle is unable to point to a specific omission of his name from a faculty directory between

October 8, 1989 and April 8, 1990. In fact, in his EEOC affidavit, dated April 6, 1990, Battle stated that the most recent failure of Duke University to acknowledge Battle as a tenured full professor, occurred in March, 1989, when the new school catalogue came out. Defs. Dep. Exh. 43. It is clear that the EEOC charge does not allege any discriminatory acts which occurred during the limitations period of October 8, 1989 through April 8, 1990.

Battle further argues that his Title VII claim is not barred because continuing violations occurred within the limitations period. However, these "continuing violations" are merely Battle's reiterations of his past complaints. The proper focus is on when the actual discriminatory act occurred, not when a complaint is made or repeated. Battle has not shown that the alleged continued violations fall within

the "continuing violation" exception. Battle is unable to point to any actual act of discrimination by Duke occurring between October 8, 1989 and April 8, 1990. Battle's reiterations of past discriminatory acts are not sufficient to constitute a continuing violation for the purposes of the limitations period.

Because Defendant [sic] have shown that all of the discriminatory acts alleged in Battle's complaint occurred prior to the 180 day limitations period and Battle cannot point to any specific discriminatory act occurring within the limitations period, his Title VII claim is barred by 42 U.S.C. § 2000e-5(e)(1). Therefore, Count I will be dismissed, and it will be unnecessary to reach defendants' other arguments concerning Count I.

B. COUNT V

Count V alleges a supplemental state law claim for breach of the Agreement. Pursuant to 28 U.S.C. § 1367(c),[9] this Court declines to exercise supplemental jurisdiction over the pendant state claim because all claims over which this Court had original jurisdiction have been dismissed. Therefore, Count V of Plaintiff's complaint is dismissed. In accordance with 28 U.S.C. § 1367(d), the period of limitations applicable to Count V shall be tolled for a period of 30 days in order for Plaintiff to file his claim in state court.

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[9]Title 28 U.S.C. § 1367(c) states:
(c) The district courts may decline to exercise supplemental jurisdiction of a claim under subsection (a) if -.
. . .
(3) the district court has dismissed all claims over which it has original jurisdiction, . . .

28 U.S.C. § 1367(c).

III.

In sum, Battle's motion to reconsider the dismissal of Count II of his complaint is DENIED, Defendants' motion for summary judgment is GRANTED as to Count I, and Count V is dismissed under 28 U.S.C. § 1367(c). Plaintiff shall have 30 days to refile the contract claim in state court pursuant to 28 U.S.C. § 1367(d).

This the 28th day of July, 1993.

/s/
United States District Judge

ENTERED ON DOCKET
R. 79(a)
AUG 5 1991
BY: /s/

FILED
AUG 5 1991
IN THIS OFFICE
Clerk, U.S. District Court
Greensboro, N.C.
By _____

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

DURHAM DIVISION

JOSEPH BATTLE,	:	
Plaintiff	:	
v.	:	1:90CV00512
DUKE UNIVERSITY, H. KEITH H. BRODIE, THOMAS F. KELLER, and RICHARD STAELIN	:	
Defendants	:	

MEMORANDUM OPINION AND ORDER

WARD, Senior Judge

This matter comes before the Court on defendants' Motion to Dismiss Counts II, III, IV, and V of this five count complaint. For the reasons stated herein, the Court will grant defendants' motion.

I. Facts

Plaintiff Joseph Battle was hired as an Associate Professor by defendant Duke for its Fuqua School of Business in 1970. Some ten years later, plaintiff alleged various acts of racial discrimination against Duke, the substance of which are not relevant to the present inquiry. These complaints resulted in a faculty grievance hearing followed by an arbitration which subsequently produced litigation in this Court in 1984. Duke University v. Battle, No. C-84-213-D (M.D.N.C. 1984). As a result of those proceedings, plaintiff received back salary in the amount of $100,000 and a salary of $48,500. All other awards made by the arbitrator were vacated. Id.

In 1987, Battle again alleged racial discrimination by Duke as well as retaliation and harassment for his earlier complaints. Battle filed his charges with

the Equal Employment Opportunity Commission (EEOC). The EEOC issued a Notice of Right to Sue concerning these charges. Battle and Duke subsequently began to negotiate a settlement of their differences, producing an agreement on October 21, 1987.[1] Duke agreed to make a payment of $24,247 for Battle's back pay, a payment of $127,819 for his pain and suffering, and monthly amounts for pain and suffering starting at $5,726.50 per month beginning October 1, 1978, and increasing to $8,057.66 per month through June 30, 1995. In return, Battle agreed to be placed on personal leave of absence without employment duties, responsibilities, or obligations of any sort. Battle's employment compensation and eligibility to

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[1]Though the parties agreed to keep this agreement confidential, plaintiff appended a copy to his complaint, thus making the agreement a matter of public record.

participate in any fringe benefit program would cease as well.

Duke also agreed to promote Battle to the rank of Professor of the Practice of Business Administration, and Battle agreed to officially retire from the Duke faculty effective three years from the execution of the agreement (October 27, 1990) at which time he would receive the title Professor Emeritus of the Practice of Business Administration. Duke further agreed to provide Battle with office space "generally comparable to office space" he then occupied. The parties agreed that this space could be located in any building at Duke and would be equipped with an I.B.M. personal computer with the following features: 1) 640k memory, 2) color graphs monitor adapter, 3) color monitor, 4) two diskette drives, 5) parallel and serial ports, 6) 8087 math co-processor, and 7) a dot matrix printer. Should the

Fuqua School of Business receive different computers, Battle would receive comparable equipment. The parties agreed on a document which would constitute Duke's recommendation as to Battle's qualifications should such be requested, and Duke agreed to purge its files of information relating to Battle except for documents concerning litigation. In addition, the parties agreed that the contents of this agreement would remain confidential and would not be disclosed by Battle. Finally, Battle released Duke and its agents from any and all claims, actions, and liability.

We now come to the claimed acts of discrimination which form the basis of this complaint. Battle alleges that Duke has frustrated the performance of its obligations under the agreement, first by failing to keep the agreement confidential. Battle claims that President Brodie falsely informed various members of Duke's

black community in May of 1988 that Battle was terminating his relationship with the university. Second, Battle alleges that Duke failed to promote him to the rank of Professor of the Practice of Business Administration. Third, Duke moved Battle's office from the business school to the library where he cannot receive his mail in the manner to which he was formerly accustomed. Further, plaintiff has been removed from the publications and directories of the business school. Finally, plaintiff received a computer from the school which would not "boot", was dirty, and had not been reconditioned.

Plaintiff filed these charges with the EEOC, but his claims were rejected by that body for a lack of jurisdiction; the EEOC found no employer - employee relationship between Battle and Duke. In fashioning the law around these facts for this Court, plaintiff styles his complaint

in terms of violations of five different areas of law: a violation of the Civil Rights Act of 1964, Title VII; a violation of 42 U.S.C. § 1981; a violation of 42 U.S.C. § 1985(3); a violation of N.C. Gen. Stat. § 74-1.1 (unfair trade practices); and a breach of his settlement agreement with Duke. Defendant has moved to dismiss all counts other than the Title VII count; each will be dealt with in turn.

II. Count II

Plaintiff's second cause of action alleges a violation of 42 U.S.C. § 1981. The thrust of plaintiff's argument is that defendants' acts constitute retaliation against him for his previous complaints of racial discrimination and, as such, are a violation of the statute. 42 U.S.C. § 1981 provides:

> All persons within the jurisdiction of the United States shall have the same rights in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to

> the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. Rev.Stat. § 1977.

The Supreme Court has recently interpreted this statute, and that interpretation controls. In Patterson v. McLean Credit Union, 491 U.S. 164 (1989), the Court held that § 1981 is restricted to claims

> forbidding discrimination in the "mak[ing] and enforce[ment]" of contracts alone. Where an alleged act of discrimination does not involve the impairment of one of these specific rights, § 1981 provides no relief. Section 1981 cannot be construed in all aspects of contract relations, for it expressly prohibits discrimination only in the making and enforcement of contracts.

Id. at 176. That interpretation was subsequently applied by the Fourth Circuit Court of Appeals in the case of Williams v. First Union National Bank, 920 F.2d 232

(4th Cir. 1990), cert. denied 59 U.S.L.W. 3810, 114 L. Ed. 2d (1991), where it was held that claims of racial discrimination in the form of retaliation for the filing of EEOC charges are not contemplated by § 1981.

It is clear to this Court that plaintiff's claimed discrimination has not interfered with the making or enforcement of his contract. The alleged discrimination involves retaliation and post-formation conduct and is not, therefore, covered by § 1981. Plaintiff's arguments that Patterson and Williams were wrongly decided and that legislation before Congress may change the present status of the law are, as defendant points out, more appropriately addressed to the appellate courts and legislative bodies. Count II must, therefore, be dismissed.

III. Count III

Plaintiff's third count alleges a violation of 42 U.S.C. § 1985(3) in the form of a conspiracy among the individual defendants and Duke University to deprive him of his civil rights. 42 U.S.C. § 1985(3) provides in part:

> If two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . . , the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators. Rev.Stat. § 1980

Defendant correctly argues that, as the agents of Duke University, the individual defendants could not conspire with the school as their actions are, by definition, the acts of the university. Buschi v. Kirven, 775 F.2d 1240 (4th Cir. 1985). "A corporation cannot conspire

with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation." Id. at 1251 (quoting Nelson Radio & Supply Co. v. Motorola, Inc., 200 F.2d 911 (5th Cir. 1952), cert. denied, 345 U.S. 925 (1953).

Plaintiff argues that there is an exception to this rule where the acts of the individuals were not authorized and cites Novotny v. Great American Federal Savings & Loan Ass'n., 584 F.2d 1235 (3rd Cir. 1978), vacated 442 U.S. 366 (1979). A reading of plaintiff's complaint discloses, however, that the only act alleged on the part of any of the individuals named as defendants was President Brodie's communication of Battle's status as a member of the faculty. This hardly constitutes a conspiracy. Count III must also be dismissed.

IV. Count IV

Battle's fourth claim alleges a violation of North Carolina's unfair and deceptive trade practices legislation. N.C. Gen. Stat. § 75-1.1. Battle claims that defendants' acts of retaliation deprived him of the benefit of his contract. That section provides in part:

> (a) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.
> (b) For purposes of this section, "commerce" includes all business activities, however denominated, but does not include professional services rendered by a member of a learned profession.

N.C. Gen. Stat. § 75-1.1.

This claim fails for at least two reasons. First, the settlement agreement at issue does not affect commerce. Nothing was bought or sold under the agreement, and it involves no trade or business. Second, plaintiff may not take advantage of the cause of action created

by the statute as he is a member of a learned profession. Plaintiff argues that, because his relationship with Duke as an employee was terminated, this exemption should not apply to him. Plaintiff should note that one's professional status transcends the employer-employee relationship. Whether Battle is employed by Duke, another university, or unemployed, he remains an academic. The exemption applies, and this Count must be dismissed.

V. Count V

The parties seem to have reached their own agreement concerning Count V by means of the pleadings. In Count V, Battle alleges that "defendants" breached his agreement. The individual defendants argue that, because they were not parties to the agreement between Duke and Battle, they cannot be liable for any breach thereof and that Count V should be dismissed as to them. Plaintiff replies that

Duke University was the only defendant intended to be the subject of Count V. Thus, Count V will also be dismissed, but only as to the individual defendants.

IT IS, THEREFORE, ORDERED that defendants' Motion to Dismiss Count II of plaintiff's complaint alleging a violation of 42 U.S.C. § 1981 be, and the same hereby is, GRANTED.

IT IS FURTHER ORDERED that defendants' Motion to Dismiss Count III of plaintiff's complaint alleging a violation of 42 U.S.C. § 1985(3) be, and the same hereby is, GRANTED.

IT IS FURTHER ORDERED that defendant's Motion to Dismiss Count IV of plaintiff's complaint alleging a violation of N.C. Gen. Stat. § 75-1.1 be, and the same hereby is, GRANTED.

IT IS FURTHERED ORDERED that defendant's Motion to Dismiss Count V of plaintiff's complaint alleging breach of con-

tract be, and the same hereby is, GRANTED, as to defendants Brodie, Keller, and Staelin.

/s/
United States District Judge

August 5, 1991.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
June 12, 1995

No. 93-2128
CA-90-512

JOSEPH BATTLE

Plaintiff - Appellant

v.

DUKE UNIVERSITY; H. KEITH H. BRODIE; THOMAS F. KELLER; RICHARD STAELIN

Defendants - Appellees

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague
CLERK